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## Private Powers for Public Order

ON THE PROTECTION OF PERSONAL LIBERTIES WHEN PRIVATE ACTORS  
MAINTAIN PUBLIC ORDER AT PUBLIC EVENTS

*Mandy van Rooij\**

### Introduction

Veronica Sunset Grooves, held in August 2009 in the Dutch municipality of Hoek van Holland, was supposed to be an amusing beach dance party, but the presence of a group of notorious hooligans caused negative tension even before it had started.<sup>1</sup> This led to severe riots and violence and the police had to intervene by firing multiple shots in self-defence, resulting in one fatal casualty.<sup>2</sup> Nearly a year later, 21 people were killed by suffocation and more than 500 people were injured at the outdoor dance festival Love Parade in Duisberg, Germany, due to severe overcrowding and panic among visitors.<sup>3</sup> In the last decade, several disturbances of the order also took place during and after football matches, such as the assault by several hooligans at the Maasgebouw in the Dutch municipality of Rotterdam in September 2011, and the clash between supporters of FC Twente and FC Utrecht nearly three months later in the municipality of Utrecht.<sup>4</sup>

All these incidents raise questions on the role and responsibility of the organizers of the particular event.<sup>5</sup> Maintaining public order and dealing with criminal behaviour may traditionally be a public task, but private actors who are organizing events which are accessible by the public also have a significant

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<sup>1</sup> E.R. Muller *et al.*, *Strandrellen in Hoek van Holland*, COT/Boom Juridische uitgevers, The Hague 2010, pp. 11, 20-22.

<sup>2</sup> *Ibid.*, pp. 104-114.

<sup>3</sup> D. Helbing & P. Mukerji, 'Crowd Disasters as Systematic Failures: Analysis of the Love Parade Disaster', *EPJ Data Science*, Vol. 1, No. 7, 2012.

<sup>4</sup> Resp. E. van der Torre *et al.*, *Relminuten bij het Maasgebouw*. Een onderzoek naar aanleiding van de ongeregelde heden bij het Maasgebouw op 17 september 2011, Auditteam Voetbal en Veiligheid, 2012; S. Barlage *et al.*, *Tussen ratio en intuïtie*. Een onderzoek naar aanleiding van de ongeregelde heden tijdens en na de wedstrijd FC Utrecht – FC Twente op 4 december 2011, Auditteam Voetbal en Veiligheid, 2012.

<sup>5</sup> E.R. Muller *et al.*, *Ordeverstoringen en groepsgeweld bij evenementen en grootschalige gebeurtenissen*, Boom Lemma uitgevers, The Hague, 2011.

responsibility to take measures in order to avoid escalation and prevent disturbance of the order.<sup>6</sup>

Private actors who are hosting a public event can use private law instruments, such as contracts, to regulate the order at their events. It is customary to regulate access to the event and the behaviour of visitors thereat in general terms and conditions applicable in the contractual relationship between the organizer and visitor. General terms and conditions can also entail sanctions to ensure compliance. Sometimes these regulations and sanctions go far beyond the possibilities of public law instruments. For example, event organizers prescribe constant camera surveillance or a standard body search at the entrance, whilst the government needs specific legitimate reasons to do so. When visitors do not act in conformity with the terms of the contract, they can be removed from the event and banned from future attendance. This shows how private actors affect personal liberties of citizens, such as the right to privacy as well as free movement in the public domain.

This chapter concerns the legitimacy of private law instruments when used by private actors to maintain public order. The dimensions of legitimacy focused on in this chapter are in regard to the protection of personal liberties and fundamental rights, and the democratic involvement and participation of those bound by such instruments. Furthermore, solely non-governmental – private – actors organizing public events are addressed, when they use ‘ordinary’ contracts, assembled through offer and acceptance by the visitors.

The first question is whether ideas on legitimization of power and protection against abuse of power, which have been developed in legal philosophy, are also relevant for a normative framework applicable to private actors contributing to public order. The second question is to what extent these ideas can be used in a specific case, when Dutch contract law is applicable.

First, I will assess in Section 1 two case studies in which private actors regulate and sanction disorderly behaviour exhibited during events accessible to the public by using contracts, namely football events and dance events. A close evaluation of these cases results in a determination of some specific characteristics of the practice in which private actors contribute to public order by using contracts. Then in Section 2, I will discuss several legal theories on the tension of power, public order, and personal liberties. Thereafter, in Section 3, I will discuss to what extent consideration is given to the general ideas following

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<sup>6</sup> See L. Johnston & C. Shearing, *Governing Security: Explorations in Policing and Justice*, Routledge, London, 2003.

from these theories in Dutch contract law, taking into account the abovementioned specific features of private actors contributing to public order. This leads to concluding remarks in Section 4.

## **1. Case Studies on Private Actors Contributing to Public Order**

### ***1.1. Introduction of the Cases***

The first question of this chapter is how private actors regulate and sanction certain types of disorderly behaviour of visitors of large public events. This question will be explored with two case studies. The aim of Section 1 is to determine specific characteristics that may be reasons to adopt a different approach of the protection of personal liberties in these private law relationships, compared to commercial transactions between two equal parties in general.

The first case concerns football matches in the Dutch Premier League. Although different football clubs are hosting these matches throughout the season, the Royal Dutch Football Association (hereafter KNVB<sup>7</sup>) is an important actor in determining and executing the behavioural rules for visitors during football matches. I will discuss both the position of the individual football club and the KNVB. Since the general terms and conditions of the KNVB are applicable on all entrance tickets to football matches in the Premier League and also lower divisions of football, this case provides a general idea on how private law instruments are being used to regulate and maintain order during football matches.

The second case concerns the organization of dance events by ID&T Company. This commercial company organizes eight large dance events in the Netherlands every year.<sup>8</sup> These dance events are widely popular, for example the 2014 edition of the event Sensation hosted 40.000 visitors and was sold out within a few hours.<sup>9</sup> ID&T is not the only company organizing large indoor and outdoor events and other event organizers may use different terms and conditions. Therefore, this case study is meant to be illustrative of how private law instruments are being used to regulate and maintain order during dance events.

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<sup>7</sup> In Dutch: Koninklijke Nederlandse Voetbal Bond, commonly abbreviated as KNVB.

<sup>8</sup> This company also organizes events in other European countries, the United States of America and Chili, but I focus in this paper on the regulations and sanctions at their Dutch events. More information on ID&T Company is available at: <<http://www.id-t.com>>.

<sup>9</sup> 'Sensation Amsterdam 2014 binnen een dag uitverkocht', *NU*, 19 March 2014. See: <<http://www.nu.nl/muziek/3739119/sensation-amsterdam-binnen-dag-uitverkocht.html>>.

In both cases I examine the scope and content of the contractual terms as well as case law on the application of these terms. These case studies are narrowed down to an examination of the rules and sanctions that are regulated in the contract and applicable general terms and conditions.<sup>10</sup>

### **1.2. Football Events: Royal Dutch Football Association (KNVB)**

At football matches nuisance and antisocial behaviour are not the exception and there is a real risk of escalation into severe violence. The recent course of events at the 2014 Dutch Cup Final, during which supporters threw fireworks on the football field and caused severe damage to the stadium, show disturbances at football events are a pressing problem of the present day.<sup>11</sup> As mentioned before, besides the individual football clubs, the KNVB is an important actor in football competitions. The association is involved in the organization of approximately 33.000 matches in different leagues.<sup>12</sup> The general mission of the KNVB is to oversee the quality of football. The association believes that football as a sport contributes to a social and healthy society. However, the association also acknowledges that it has the task to create and maintain a safe and respectful football climate. Even though the mission statement of the KNVB doesn't explicitly mention controlling public order as a task, providing clear rules and sanctions on nuisance and anti-social behaviour falls within the scope of the mission to create a safe football climate, for players as well as spectators.

A football match can only be attended by visitors who are in possession of an entrance ticket. It is possible to purchase a ticket for one match, or a club card that grants access to all home matches of one football club. In both cases the visitor enters into a contractual relationship with the specific football club. The football clubs have declared the general terms and conditions of the KNVB, referred to as KNVB Standard Terms 2013/14, applicable on the sale of all tickets and club cards.<sup>13</sup> In principle the visitors do not have a contractual relationship with the KNVB, but the football clubs have authorized the KNVB to enforce the sanctions on their behalf, so indirectly the KNVB is involved in the execution of the contractual terms, including the general terms.<sup>14</sup> However,

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<sup>10</sup> The factual practice on how these regulations and sanctions are executed by the private actors and their security personnel is interesting, but falls outside of the scope of this paper. For more on this, see T. Jones & T. Newburn, *Private Security and Public Policing*, Oxford University Press, Oxford, 1998.

<sup>11</sup> 'Vuurwerkincident Ajax-PEC Zwolle; een reconstructie', *NOS*, 21 April 2014. See: <<http://nos.nl/audio/638689-vuurwerkincident-ajaxpec-zwolle-een-reconstructie.html>>.

<sup>12</sup> See: <<http://www.knvb.nl/wiezijnuw/missie-visie>>.

<sup>13</sup> In Dutch: KNVB Standaardvoorwaarden 2013/'14, available at: <<http://downloadcentrum.knvb.nl/sportlink/knvb/document/knvb%20standaardvoorwaarden%20def%202013%2003%2018.pdf?id=69429>>.

<sup>14</sup> Article 10.5 KNVB Standard Terms 2013/'14. A.J. Wierenga & J.G. Brouwer, 'Bestrijding voetbalvandalisme via het privaatrecht', in J.G. Brouwer & A.E. Schilder (Eds.), *Van een andere orde. Over private ordehandhaving*, Boom Juridische uitgevers, The Hague, 2014, pp. 98-99.

concerning the random public outside of the stadium – who did not purchase a ticket and who are not on the premises of the football club – the club and the KNVB lack power to impose restrictions on the basis of the Standard Terms.<sup>15</sup>

The Standard Terms are published on the website of the KNVB. They contain a mix of specific and broadly described behavioural rules for visitors. Article 8, for example, entails specific rules in the form of a detailed list of prohibited objects and behaviour in order to protect the health and safety of the public and public order. It is for example prohibited to bring glass, cans and poles into the stadium as well as ‘banners and/or other objects on which, in the opinion of [...] the security personnel [...] are discriminatory and/or provocative texts, images or shapes are depicted’.<sup>16</sup> This list is very specific, although it is not a closed list. Furthermore, Article 8 grants the football club and security personnel competencies with a wide discretion to act:

‘It is prohibited in the stadium to [...] have in possession resources which, in the opinion of the [...] security personnel [...] cause unnecessary nuisance and/or inconvenience to others or may give rise to and/or may cause harm to any other person or property.’<sup>17</sup>

Also: ‘It is prohibited to behave in a way that others may experience as provocative, threatening or offensive’.<sup>18</sup> The open formulation of Article 8 indicates that the KNVB, the football club and its security personnel have discretionary powers.<sup>19</sup>

The general terms also prescribe that security personnel are entitled to perform a body search in order to check if any prohibited items are in the visitor’s possession if there is suspicion of a criminal act or if the visitor grants permission to do so.<sup>20</sup> However, if the permission is not granted, the security personnel may refuse entrance and remove the visitor from the premises.

Other sanctions can be found in article 10, such as a national stadium ban and fines up to EUR 450 per incident.<sup>21</sup> The KNVB is entitled to impose these sanctions if ‘according to report of a football club or the public prosecutor inside and/or outside the stadium as part of an event’ a person violated the terms,

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<sup>15</sup> Hof The Hague 8 September 2006, ECLI:NL:GHSGR:2006:AY6000, Nos. 14-16. Also see Rb. Maastricht 4 September 2006, ECLI:NL:RBMAA:2006:AY7409, No. 3.5.

<sup>16</sup> Article 8.1 KNVB Standard Terms 2013/’14.

<sup>17</sup> Article 8.4 KNVB Standard Terms 2013/’14.

<sup>18</sup> Article 8.5 KNVB Standard Terms 2013/’14.

<sup>19</sup> See Rb. Leeuwarden 15 May 2009, ECLI:NL:RBLEE:2009:BI4091, No. 4.4.

<sup>20</sup> Article 8.7 KNVB Standard Terms 2013/’14.

<sup>21</sup> See further Wierenga & Brouwer, *supra* n. 14, pp. 85-90.

committed a criminal offence, is suspected of football-related misconduct, or behaved undermining the prestige or impairing the importance of football.<sup>22</sup> Since it is unclear beforehand what is considered to be ‘behaviour undermining the prestige of importance of football’ Article 10 also indicates a wide discretion for the football clubs and the KNVB. However, for the execution of these open formulated terms, the KNVB has adopted the Guidelines Term Stadium Ban 2013/14 in which the scope of the above-mentioned open terms are further specified.<sup>23</sup> According to these guidelines, the term of the stadium ban depends on the severity of the misconduct and varies from three months for not being able to show identification papers in the stadium to twenty years for assault that leads to death. The KNVB and individual clubs do however deviate from these guidelines; in 2011 football club Ajax sanctioned a supporter for entering the football field and attacking a player of the opposing team by imposing a stadium ban for thirty years.<sup>24</sup>

The KNVB explicitly states in Article 10 that these sanctions shall all be imposed without judicial intervention. For the execution of the stadium bans the KNVB has created a self-binding Behaviour Code Stadium Bans,<sup>25</sup> in which Article 15 grants a person the right to complain within fourteen days at the Commission Stadium Bans if he doesn’t agree with the sanction.<sup>26</sup> This commission, however, cannot be considered to be an independent review, in comparison with judicial review, because its members are appointed by the KNVB itself. Aside from this complaints procedure, it remains possible for the visitors affected to seek remedies via a civil procedure.<sup>27</sup>

### ***1.3. Dance-events: ID&T Company***

An orderly situation during dance events is also not a given, considering severe crowding and the use of mood altering substances by the public. ID&T is a commercial company organizing electronic music events and experiences.<sup>28</sup> The mission of ID&T is in their own words is: to create dance events that bring people together and have fun. Controlling public order may not be their core business, but during the course of an event the security is highly professional.

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<sup>22</sup> Article 10.2 KNVB Standard Terms 2013/’14.

<sup>23</sup> In Dutch: Richtlijn termijn stadionverboden 2013/’14, available at:

<<http://downloadcentrum.knvb.nl/sportlink/knvb/document/richtlijnen%20stadionverbod?id=49716>>.

<sup>24</sup> ‘30 jaar Arena-verbod voor hooligan’, *NOS*, 24 December 2011, see: <<http://nos.nl/artikel/325197-30-jaar-arenaverbod-voor-hooligan.html>>. At the time the ban was issued the criminal trial was still pending, resulting in four months imprisonment.

<sup>25</sup> In Dutch: Gedragscode Stadionverboden, available at:

<<http://downloadcentrum.knvb.nl/sportlink/knvb/document/gedragscode%20stadionverboden.pdf?id=224>>.

<sup>26</sup> Article 14 Behaviour Code Stadium Bans. Wierenga & Brouwer, *supra* n. 14, pp. 114-116.

<sup>27</sup> *Rb. Maastricht* 23 July 2009, ECLI:NL:RBMAA:2009:BJ3510, No. 4.1.

<sup>28</sup> See: <<http://www.id-t.com/company/our-company/>>.

ID&T also primarily uses general terms and conditions to impose rules and sanctions. Entrance to their events can only be granted if an entrance ticket is purchased. In the process of purchase, reference is made to the applicability of general terms and conditions, which are also published on the website of the specific event.

The general terms of ID&T Company also contain a mix of specific and broadly prescribed prohibited objects and behaviour. In Article 16 the company reserves the right to search the clothes of visitors to the event prior to entry and during the event. The visitor who denies this can be refused access to the event without refund of the admission fee or can be removed immediately. The list of prohibited items in Article 17 is also specific, but not exhaustive: glass, plastic bottles, drinks, food, drugs, cans, fireworks, animals, weapons and/or dangerous objects are prohibited. Furthermore, confiscated goods are not returned and will be destroyed.

There is not a specific list of behavioural rules; Article 22 states that the visitor is:

‘bound to comply with all rules, house rules and/or amendments and instructions from the ID&T Company [...], the operators of the site where the event is held, the security personnel [...] and other authorized persons’.

Such rules are said to be expressed at the premises or location of the specific event and if possible beforehand on the website of the specific event. This means that at the time of the purchase these rules may not yet have been set.

In case of violation of these terms and the rules expressed at the event itself, the security personnel has the right to immediately remove the visitor.<sup>29</sup> Also in general, Article 18 states that ID&T company is ‘entitled to refuse or remove certain persons, if in its opinion it is necessary for maintaining public order and security during the event [...]’. This can be considered as a wide discretion as well. Even though this is not prescribed in their general terms, ID&T Company also bans specific people due to disorderly behaviour. For example in 2012 ID&T banned the boxing professional Badr Hari from all future ID&T events for life, because he caused severe physical injuries to another visitor.<sup>30</sup>

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<sup>29</sup> Articles 17.2 and 22.2 General Terms and Conditions Applicable between ID&T Companies and Its Visitors.

<sup>30</sup> ‘ID&T: levenslang toegangsverbod voor Badr Hari’, *RTL News*, 7 December 2012. See: <<http://www.rtlnieuws.nl/economie/idt-levenslang-toegangsverbod-voor-badr-hari>>. At the time the ban was issued, criminal trial was still pending, resulting in 18 months imprisonment.



If a visitor doesn't agree with the execution of the contractual terms or considers it to be wrongful, he is entitled to seek remedies via a civil procedure. There is no case law available concerning the practice of the ID&T Company. Most cases on security measures during comparable public events concern liability for damages suffered by visitors at the site.<sup>31</sup> The general outcome of these cases is that event organisations have a duty of care for the safety at their event, but they are not liable if they have taken sufficient precautionary measures.

#### ***1.4. Three Specific Characteristics***

Traditionally contractual relationships can be characterized as horizontal, based on autonomy of both parties, concerning one or more obligations that lead to tangible advantage.<sup>32</sup> In my observation, the foregoing cases show three specific characteristics.

##### *Executing the Contractual Terms Serves the Order in the Public Domain*

The regulations in the general terms and conditions concern behaviour exhibited at areas that are accessible to the public and therefore contribute to order in the public domain. 'Accessible to the public' means that admission to the area is available to an undetermined group of people, who may have access as long as they behave in conformity with the purpose of the area.<sup>33</sup> The purpose of the before-mentioned public events is to provide entertainment. This serves a social need and private actors are willing to fulfil this need because of commercial reasons. These areas accessible to the public can be distinguished from 'general public places', such as the public streets, public waters and public parks, because access to these places is not limited for a certain purpose.<sup>34</sup> As to areas accessible to the public, the managing actor – which may very well be a private actor – plays an important role in determining the extent of access and the purpose of use.<sup>35</sup>

Private actors can choose to make an event available to the public, although in most cases they will need a certain event license to do so, granted by the municipality.<sup>36</sup> When an event is in fact open to the public, according to Dutch

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<sup>31</sup> E.g., HR 23 February 2007, ECLI:NL:HR:2007:AZ6219, *NJ* 2008, 492; Hof Amsterdam 25 October 2007, ECLI:NL:GHAMS:2007:BB6504, *GJ* 2007/167; Rb. Middelburg 19 January 2011, ECLI:NL:RBMID:2011:BP3939; Rb. Utrecht 7 March 2007, ECLI:NL:RBUTR:2007:BA0230.

<sup>32</sup> F.W. Grosheide, *Karakteristiek van het privaatrecht*, Ars Aequi Libri, Nijmegen, 2001, pp. 10-11; P.H.M. Gerver, H. Sorgdrager & R.H. Stutterheim (Eds.), *Het systeem van het Nederlandse privaatrecht (founded by A. Pitlo)*, Gouda Quint, Arnhem, 1995, no. 21.

<sup>33</sup> *Parliamentary Papers II*, 2000/01, 27 732, No. 3.

<sup>34</sup> H.Ph.J.A.M. Hennekens, *Openbare-orderecht*, Kluwer, Deventer 2007, Para. 1.3.

<sup>35</sup> HR 18 May 2004, ECLI:NL:PHR:2004:AO2599, *NJ* 2004, 527, HR 12 October 2004, ECLI:NL:HR:2004:AP4260, *NJ* 2004, 662 (*Zweetvoetenman*).

<sup>36</sup> Regulated at the level of the municipality in the General Local Ordinance. E.g., Rb. Amsterdam 29 May 2008, ECLI:NL:RBAMS:2008:BD2795.

law it is the task of the mayor of the municipality where this takes place, to monitor the affairs at the event.<sup>37</sup> He is entitled to give orders to secure the safety and health of the public. However, the competence of the mayor doesn't relieve the event organizer of his responsibilities to maintain order at his event. It is generally an obligation in the event license for the organizer to control the order at their event and ensure the safety and health of the public.<sup>38</sup> Accordingly, even if security and control of public order is not the core business for the event organizer, it becomes an obligation due to the event license. Visitors can hold the organizer liable for damages caused by a disorderly affair during the event.<sup>39</sup> Hence, the event organizer has a responsibility to effectively contribute to public order in order to prevent damages for the rest of the public.

*The Contract Affects Personal Liberties and Accessibility of Social Resources*

The foregoing leads to the idea that the public visiting football matches and dance festivals has a legitimate interest in an orderly and safe environment during the event. On the other hand, the public also has a legitimate interest in the accessibility of public goods and services, since these fulfil a certain social need.<sup>40</sup> In my view, football and dance festivals contribute to the wellbeing and the quality of life of people. Both the KNVB and ID&T company also stress the importance of their events in their mission statements: football contributes to a social and healthy society and dance events bring people together to have fun. Von Hirsch and Shearing call means, like such public events, which contribute to the quality of life of citizens, 'social resources'.<sup>41</sup> Public events are part of the social life and contribute to the self-fulfilment of citizens outside the private domain of their homes.<sup>42</sup>

One can argue that if certain personal liberties are compromised in order to gain access, this has a negative effect on the accessibility. The aforementioned regulations impose restrictions on the accessibility of the public events, as it asks visitors from the outset to abandon aspects of their personal liberties by accepting the general terms and conditions, a necessity for gaining the right to access. A search of clothes and camera surveillance affect the privacy of

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<sup>37</sup> Article 174 Municipality Act.

<sup>38</sup> ABRvS 7 May 2004, AB 2004, 254 (*Volksfeesten Albergen*).

<sup>39</sup> See case law *supra* n. 31.

<sup>40</sup> Scientific Council for Governmental Policies (in Dutch: Wetenschappelijke Raad voor het Regeringsbeleid), *Borgen van publiek belang* (Reeks rapporten aan de regering nr. 56), Sdu Uitgevers, The Hague, 2000, pp. 19-20.

<sup>41</sup> A. von Hirsch & C. Shearing, 'Exclusion from Public Space', in A. von Hirsch, D. Garland & A. Wakefield, *Ethical and Social Perspectives in Situational Crime Prevention*, Hart Publishing, Oxford 2002, pp. 83-84.

<sup>42</sup> *Ibid.*, 2002, pp. 83-85.

citizens.<sup>43</sup> If thereafter sanctions are indeed being imposed, a person is then effectively removed or banned in the future, affecting his freedom of movement.<sup>44</sup> Also, if confiscated goods are destroyed, this affects property rights.<sup>45</sup> Therefore, visitors have to endure limitations of these rights in order to attend football matches and dance events. If personal liberties have to be partly compromised in order to gain access, the accessibility of social resources is to some extent restricted. On the other side of this argument, the restrictions are supposed to contribute to personal safety during the event and this can also be considered a fundamental interest of the visitor. This shows the ambiguity of the security measures enforced on visitors. Nevertheless, security measures imposed by private organizers of large public events affect personal liberties of potential visitors.

*Visitors Have Limited Power to Alter the Terms or Choose Alternative Suppliers*

In the foregoing, it was observed that the object of the contract concerns the accessibility to social resources, whilst in return personal liberties are possibly compromised. Nevertheless, the contract cannot be concluded without consent of both parties, so the visitors do have a choice in avoiding the negative consequences simply by rejecting the terms. In the case of football matches and dance festivals it is not possible – or not successful anyway – to propose modification of the terms of the contract in order to avoid breaches of personal liberties. The contract on entrance of public events can be characterized as a ‘take it or leave it contract’, also referred to as adhesion contracts or standardized contracts.<sup>46</sup> Such contracts are, in principle, not impermissible at all; it is inherent to the nature of commercial transactions.

However in contracts concerning football matches, an additional characteristic may be observed: this particular social resource is not available at an alternative supplier. The KNVB has a unique monopolistic position, since their general terms and conditions are applicable on all entrance tickets in the Premier League, as well as lower leagues. As said before, all football clubs have authorized the KNVB to act on their behalf, so even without a direct contractual relationship, the KNVB is entitled to impose sanctions. In other words: whoever

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<sup>43</sup> See Article 8 European Convention on Human Rights (ECHR), horizontal effect is acknowledged in HR 9 January 1987, *NJ* 1987, 928 (*Edamse bijstandvrouw*). See further on personal data collection by the KNVB, Wierenga & Brouwer, *supra* n. 14, pp. 100-110.

<sup>44</sup> See Article 2 Fourth Protocol of the ECHR. Even though horizontal effect of this article is not acknowledged, nevertheless the general idea of the liberty of movement can be seen as a legitimate interest of citizens, also in horizontal relations. See further A.E. van Rooij, ‘Private ordehandhaving op voor het publiek toegankelijke plaatsen’, in J.G. Brouwer & A.E. Schilder (Eds.), *Van een andere orde. Over private ordehandhaving*, Boom Juridische uitgevers, The Hague, 2014, pp. 49-79.

<sup>45</sup> Acknowledged as a fundamental right in Article 1 First Protocol of the ECHR.

<sup>46</sup> See N.S. Wilson, ‘Freedom of Contract and Adhesion Contracts’, *International and Comparative Law Quarterly*, Vol. 14, 1965, pp. 172-193.

wants to be present a professional football match, has to deal with the terms the KNVB proposes. The market of dance events on the other hand is more diffuse. Although ID&T Company is considered to be a leading actor in the dance music industry, there are many alternative market players organizing similar events. One could argue that if the general terms of one player are too stringent, the consumer can choose to enjoy himself elsewhere.

## 2. Theories on Power, Public Order and Personal Liberties

### 2.1. Ideas Developed in Legal Philosophy

In the previous section, certain characteristics of private parties contributing to public order were determined. These characteristics show the tension between power, public order as a public interest, and personal liberties as private interests. This can hardly be characterized as a new development, as such tension is basically at the core of several philosophical theories developed during the Enlightenment. John Locke and Jean-Jacques Rousseau, among others, have developed theories in which the legitimization of governmental power and the protection against abuse of power is explained by constructing a social contract.<sup>47</sup> The social contract is generally based on the idea that it is in the best interest of people to accept certain restrictions on their personal freedom, for the purpose of protection of the remaining personal freedom in an orderly society.<sup>48</sup> The question is to what extent these classical theories are also relevant for the present day society in which private parties are added to the equation, since they also contribute to the public interest of public order and security.

Even though Locke and Rousseau have different views on the form of this social contract and the status of the parties herein, these theories have in common that they presume society needs to appoint a certain body to enforce laws in order to prevent disorder and thereby protect the remaining personal freedom of the people. However, because of the reciprocity in the social contract, these powers cannot be unlimited. Certain safeguards have to be taken into account to prevent abuse.<sup>49</sup> Locke acknowledges some ground principles for the freemen: the fundamental right to life, physical integrity and freedom are personal and not

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<sup>47</sup> J. Locke, *Second Treatise of Government*, originally published anonymously in 1689, available at: <<http://www.gutenberg.org/ebooks/7370>>; J.J. Rousseau, *Du contrat social ou droit politiques*, originally published in 1762, recent edition: J.J. Rousseau (Ed. & Transl. by V. Gourevitch), *The Social Contract and Other Later Political Writings*, Cambridge University Press, Cambridge, 1997.

<sup>48</sup> D. Boucher & P. Kelly, 'The Social Contract and Its Critics: An Overview', in D. Boucher & P. Kelly (Eds.), *The Social Contract from Hobbes to Rawls*, Routledge, London, 2004, pp. 1-34.

<sup>49</sup> R. Nehmelman & C.W. Noorlander, *Horizontale werking van grondrechten*, Kluwer, Deventer, 2013, p. 16.

transferable and authority is granted under the rule of law and separation of powers.<sup>50</sup> He considers this to be of natural law; even before or without a civil government to enforce certain laws these principles should be respected. It is important to realize that in the vision of Locke these personal liberties are of horizontal effect and citizens can invoke them against one another.<sup>51</sup> Rousseau focuses more on the principle of democracy as he finds all actions of the governmental body should be determined by participation of the people.<sup>52</sup>

The classical contract theories aim to explain the legitimacy of authority of a government over individual citizens to which they did not actually give their consent. This focus can be explained by the spirit of the age; Sixteenth Century Europe entered an era of classic absolutism and the contract theories were a reaction to the excessive powers of absolute monarchs.<sup>53</sup> However, in contemporary contract theories, such as that developed by John Rawls, it is also acknowledged that private organizers contributing to public interests should be taken into account.<sup>54</sup> Rawls argues that the whole network of actors should strive for justice and should take certain fundamental rights into account when distributing social goods. His ideas however are rejected by Robert Nozick.<sup>55</sup> Nozick's view on natural law is very restricted, he merely acknowledges property rights, the right to self-determination and the right to self-defence.<sup>56</sup> In other words; as long as people have self-determination and therefore have the ability to refuse certain disadvantageous terms, they cannot claim any extra protection of personal liberties.

Even though the foregoing social contract theories are primarily focused at legitimacy of unilateral governmental actions, they are also relevant in other arrangements – in which private actors are active players – if these arrangements show certain similarities to governmental control. Unilateralism, in which one actor can subject another to restrictions even against one's will, is one similarity. I will refer to this as 'power' in the next section. A second similarity is the contribution to the public interest, such as order in the public domain, which is discussed in Section 2.4.

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<sup>50</sup> In *Second Treatise*: Chapter IX of the ends of political society and government, Secs. 123-142.

<sup>51</sup> Nehmelman, *supra* n. 49, p. 17.

<sup>52</sup> In *The Social Contract*: Chapter II.5 (The limitations of the sovereign power).

<sup>53</sup> R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge University Press, Cambridge, 2000, pp. 91-107.

<sup>54</sup> J. Rawls, *A Theory of Justice*, Belknap Press of Harvard University Press, Cambridge, 1971 (revised edition 1999).

<sup>55</sup> R. Nozick, *Anarchy, State, and Utopia*, Basic Books, New York, 1974, pp. 183-231.

<sup>56</sup> B.E.P. Driessen, *Van utopie naar anarchie. Een kritische studie van de politieke theorie van Robert Nozick*, Voorschoten, 1990, p. 66.

## 2.2. 'Power' as Reason for Extensive Protection of Personal Liberties

The ability of governments to unilaterally subject their citizens to restrictions is an important element in social contract theory. The two case studies have shown that event organizers constitute rules and sanctions in their general terms and visitors have very limited abilities to change these rules and sanctions if they want to visit this particular event. If one of the parties is restricted in achieving his goals in the contractual negotiation, does this mean the event organizer has power similar to governmental power?

Formally the relationship of private parties can be distinguished from the relationship of governments and their citizens, because private parties operate in a horizontal relationship with one another based on consent, whilst the government can operate unilaterally.<sup>57</sup> One can question whether more modes of power can be found in society, apart from governmental power. Max Weber developed a substantive approach, in which empirical research is necessary for the determination of power. If a certain actor is able to realize his own will even against the will of others, according to Weber, this is in an indication of power.<sup>58</sup> If an actor wants to exercise power on a more stable basis, he also needs domination or authority.<sup>59</sup> It depends on the reality of the individual and his cultural universe whether a certain actor has power and domination, which means empirical research on specific social actions is needed to establish what is a dominant actor.<sup>60</sup> According to Weber's theory it is possible to have more than one dominant actor in a society, however, an entity that in the end successfully claims a monopoly on the legitimate use of violence is a state.<sup>61</sup>

Weber's theory on domination provides a possible tool to analyse the developments of legality and power in today's society so the relevant questions on legitimacy, such as the applicability of certain safeguards, are exposed.<sup>62</sup> A critical element in discussing power is to what extent the 'powers' of the private actor are based on consent by the subjects. A subsequent step is to determine to what extent an actor is able to fulfil his own interests, whilst possibly to the disadvantage of other parties. This cannot be seen as a dichotomy in which an

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<sup>57</sup> Grosheide, *supra* n. 32, pp. 10-11.

<sup>58</sup> M. Weber, *Wirtschaft und Gesellschaft*, originally published in 1922. Recent edition: G. Roth & C. Wittich (Eds.), *Max Weber on Economy and Society*, University of California Press, Berkeley, 1978; J. Kocken, 'Questioning Legitimacy', in L. Huppes-Cluysenaer, R. Knegt & O.W. Lembcke (Eds.), *Legality, Legitimacy and Modernity: Reconstructing Max Weber's Concept of Domination* (Recht der werkelijkheid, Vol. 29, No. 3), Reed Business, The Hague, 2008, pp. 8-9.

<sup>59</sup> Kocken, *ibid.*, p. 9.

<sup>60</sup> K. Allen, *Max Weber. A Critical Introduction*, Pluto Press, London, 2004, p. 175.

<sup>61</sup> M. Weber, *Politics as Vocation (Politik als Beruf)*, originally published in 1919.

<sup>62</sup> N.F. van Manen, 'Legitimacy and Types of Legality', in L. Huppes-Cluysenaer, R. Knegt & O.W. Lembcke (Eds.), *Legality, Legitimacy and Modernity: Reconsidering Max Weber's Concept of Domination*, The Hague, 2008, pp. 85-86.

actor either does or does not have power, but it is rather a sliding scale. In order to determine the actual ‘degree’ of power in a specific case, empirical research on the specific circumstances of each case is necessary.

In the case of public events, the event organizers are able to realize their will to enforce regulations and sanctions against the visitors, even though this harms the personal liberties of the visitors. This power is based on the contract, to which the visitors consented. Weber calls this ‘legal authority’.<sup>63</sup> But why do these visitors accept terms that may possibly lead to severe breaches of personal liberties? A probable element is reciprocity; the individual who accepts such limitations thereby gains a right, in this case the right to access a specific event.<sup>64</sup> Establishing certain limiting terms is justified by freedom of contract and if a person does not agree he is free to decline and enjoy the services elsewhere. However, if the individual is hindered to enjoy comparable rights elsewhere, for example because in the case of the KNVB, the individual will be inclined to accept the terms anyway. This, it is argued here, is an indication of power.

### 2.3. ‘Public Interest’ as Reason for Extensive Protection Personal Liberties?

In the previous section, it was discussed how ‘power’ can be defined and determined in a specific case. The two case studies on event organizers also showed another specific characteristic; the organizers contribute to order at public areas and thereby serve the fundamental public interest of public order. In this section, I will examine whether this is a useful criterion for assessing the desired protection against possible abuse of power in a specific case.

According to Clapham it is impossible to truly separate a private sphere from a public sphere. In order to prevent artificial deficiencies, he argues that international treaties in which human rights are protected, such as the ECHR, should also have effect for non-state actors.<sup>65</sup> He uses the development of private prisons, private health care facilities, and private policing powers to show how artificial the public-private divide really is.<sup>66</sup> To determine the

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<sup>63</sup> M. Weber, ‘The Types of Legitimate Domination (1914)’, in C. Calhoun, *Classical Sociological Theory*, Blackwell Publishing, Malden, 2007, pp. 256-257.

<sup>64</sup> W.G.M. Salet, *Om recht en staat. Een sociologische verkenning van sociale, politieke en rechtsbetrekkingen* (Series: Voorstudies en achtergronden Wetenschappelijke Raad voor het Regeringsbeleid, V83, 1994), Sdu Uitgevers, The Hague, 1994, pp. 35-45.

<sup>65</sup> A. Clapham, *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 2002, pp. 124-133. See Nehmelman & Noorlander, *supra* n. 49, pp. 61-66 for an overview of Clapham’s theory.

<sup>66</sup> Nehmelman & Noorlander, *supra* n. 49, pp. 64-65. Clapham cites P. Cane, ‘Public and Private Law: A Study of the Analysis and Use of a Legal Concept’, in J. Eekelaar & J. Bell (Eds.), *Oxford Essays in Jurisprudence: Third Series*, Clarendon Press, Oxford, 1987, pp. 57-61. See further J.M. Amaya-Castro, *Human Rights and the Critiques of the Public-Private Distinction*, VU University, Amsterdam, 2010.



applicability of obligations derived from such international treaties the nature of the activity should be taken into account; the identity of the actor is no longer relevant. This is in line with Weber's empirical approach.

Even though the ideas of Clapham may be appealing, it is difficult to determine to what extent an activity has a public nature in order to justify applicability of fundamental rights. Clapham focuses primarily on private actors involved in armed international conflicts and in that context security can definitely be considered to have a public nature, even if private companies join forces.<sup>67</sup> The particular cases I pointed out in this paper may concern mainly the leisure of people and not survival in areas of armed conflict, yet the open accessibility of large events and the severe security risks thereat are in my opinion reference points for adopting the idea that security measures during such events are to a certain extent of public nature. However, prevention of damages in itself has a private nature as well. Can one really determine whether the measures undertaken by the private organizers of events are truly aimed at protecting public order, or are these measures primarily aimed at preventing damages, whereby public order is a mere side effect? Both motives are legitimate. These questions make the determination of the nature of the action rather difficult.

I do agree with Clapham that there is a grey area in which it is not clear what is public or private, or in which the division feels artificial. The formal nature of the actor itself is therefore not sufficient to determine the desired protection of personal liberties and more context is necessary. Jurgens and Van Ommeren also find the public-private distinction to be context-dependant.<sup>68</sup> Aside from the difficulties in assessing the nature of activities, I find the nature of the activity in itself is not enough to determine whether a more stringent regime is justified. In private relations which can be characterized as horizontal and in which both parties enjoy freedom of contract, there is also no indication to assume the application of fundamental rights, even if the object of the contract concerns a good or service of public or social value.<sup>69</sup> If the characterization as 'private' seems artificial often other underlying reasons lead to this conclusion, such as the absence of choice, a monopoly position, or governmental influence. In the end this leads back to 'power' as a distinctive feature.

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<sup>67</sup> A. Hallo de Wolf, *Reconciling Privatization with Human Rights*, Intersentia, Antwerp, 2011, Chapter III.

<sup>68</sup> G.T.J.M. Jurgens & F.J. van Ommeren, 'The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependant Divide', *The Cambridge Law Journal*, Vol. 71, No. 1, 2012, pp. 172-199; G.T.J.M. Jurgens & F.J. van Ommeren, *De opmars van het onderscheid tussen publiekrecht en privaatrecht in het Engelse recht*, Boom Juridische uitgevers, The Hague, 2009, pp. 108-110.

<sup>69</sup> B.J. de Vos, *Horizontale werking van grondrechten. Een kritiek*, Maklu, Apeldoorn, 2010.



### 3. Power and Personal Liberties in Dutch Contract Law

#### 3.1. *Freedom of Contract and Its Restrictions*

In the foregoing sections, ideas on power, public order and personal liberties were described. In this section, I will assess to what extent these ideas are incorporated in the Dutch contract law.

Limitations concerning access to and behaviour at public events are based on freedom of contract of the parties. Freedom of contract comprises the principle that all private bodies have the freedom to determine with whom to conclude a contract, as well as the freedom to determine the content and the moment of concluding.<sup>70</sup> It also implies the freedom not to conclude a contract with a certain party. The ratio of freedom of contract is that the individual is able to develop his personal life in society and to look after his property interests, as he wishes.<sup>71</sup> The principle of freedom of contract in itself is not codified in the Dutch Civil Code, but the Civil Code does prescribe certain limitations thereof.

Freedom of contract is considered of great importance in private law matters, but this freedom is not unlimited. The rights and entitlements of others and of society impose restrictions on freedom of contract.<sup>72</sup> A relevant question is: when do the rights of one party outweigh the freedom of contract of another party, whilst in private law relationships both parties are deemed to be equal? In some situations, horizontality between parties was believed to be a structural fiction and this has led the legislator to arrange additional provisions in the Civil Code to protect weaker parties. For consumer relations such additional provisions are adopted concerning general terms and conditions.<sup>73</sup> Since these – sometimes extensive – general terms are drafted by a professional supplier in accordance with his own interests, the consumer may be at a disadvantage.<sup>74</sup> The two case studies showed that event organizers indeed use general terms and conditions to prescribe behavioural rules and sanctions. Article 6:233 of the Civil Code is at the heart of the regime on general terms and conditions in consumer relations and determines when general terms are voidable.

A term is voidable when the term is unreasonably onerous having regard to the nature and content of the contract, the knowable interests of parties, and the

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<sup>70</sup> J. Hijma *et al.*, *Rechtshandeling en Overeenkomst*, Kluwer, Deventer, 2010, No. 14.

<sup>71</sup> Asser/Hartkamp & Sieburgh 6-III\* 2010/58.

<sup>72</sup> Asser/Hartkamp & Sieburgh 6-III\* 2010/57. E.g. Article 3:40 Civil Code sets the limitations of the content of contracts, such as public order and morality.

<sup>73</sup> Section 6.5.3 in the Dutch Civil Code. This is the implementation of EU Directive 93/13/EEG.

<sup>74</sup> Definition of consumer: Article 7:5 Civil Code.

specific circumstances of the case.<sup>75</sup> The case studies showed that the general terms and conditions used by the KNVB and ID&T Company contain mainly open norms for controlling order during public events. The use of open norms in contracts is in itself not uncommon and not unreasonable as such. Open formulated contractual terms contribute to the flexibility of contracts, since they are sufficient to serve a wide variety of circumstances and can be adapted to the specific circumstances of each case.<sup>76</sup> The interpretation of open contractual terms is not only based on the literal text, but also on the meaning parties could reasonably attach to it.<sup>77</sup> Accordingly, when regulations are enforced and sanctions are imposed, both on the basis of open formulated general terms and conditions, reasonableness also has to be taken into account.

But how can it be determined what is reasonable? Reasonableness and fairness are of fundamental importance in contractual relations. According to Article 6:2 Civil Code: ‘The creditor and debtor must behave themselves towards each other in accordance with the standards of reasonableness and fairness.’ Reasonableness and fairness can be considered to be an open formulated behavioural norm for parties towards one another.<sup>78</sup> If civil proceedings are initiated, a judge will decide what was to be considered reasonable in that specific case. Article 3:12 Civil Code states that when determining what reasonableness and fairness demands in a specific case ‘one has to take into account the generally accepted legal principles, the fundamental conceptions of law in the Netherlands and the relevant social and personal interests which are involved in the given situation.’ From case law certain factors of influence can be derived, such as the behaviour of parties and their qualities, negotiating position and specific interests, including personal liberties.<sup>79</sup> In the next section, I will examine these factors in the case of event organizers contributing to public order.

### **3.2. Different Factors Influencing Reasonableness and Fairness**

Firstly, the standards of reasonableness and fairness in a specific case are influenced by the behaviour of parties. Objectionable conduct, which is attributable to one of the parties, is generally of disadvantage to the culpable

<sup>75</sup> Article 6:233(a) Civil Code. Certain specific terms are determined to be unreasonable and therefore voidable in Article 6:236 Civil Code, this is referred to as a ‘black list’, or presumably unreasonable in Article 6:237 Civil Code, which is a ‘grey list’.

<sup>76</sup> E.F.D. Engelhard, ‘Handhaven van en door het privaatrecht’, in E.F.D. Engelhard, *Handhaving van en door het privaatrecht*, Boom Juridische uitgevers, The Hague, 2009, p. 28.

<sup>77</sup> HR 13 March 1981, *NJ* 1981, 635 (*Ernes/Haviltex*).

<sup>78</sup> P.S. Bakker, *Redelijkheid en billijkheid als gedragsnorm*, Kluwer, Deventer, 2012, Chapter 1.

<sup>79</sup> P.T.J. Wolters, *Alle omstandigheden van het geval. Een onderzoek naar de omstandigheden die de werking van de redelijkheid en billijkheid beïnvloeden*, Kluwer, Deventer, 2013. Wolters uses the term ‘factor’ rather than the more common ‘reference points’, see Para. 1.4.2.

party.<sup>80</sup> The Supreme Court for example determined that it was not reasonable for a tenant to invoke certain rights to his protection, after he had severely misbehaved towards his neighbours.<sup>81</sup> When interpreting the meaning of open formulated contractual terms, the judge is likely to decline an interpretation that is likely to favour a party that has behaved culpably objectionable towards his counterparty. The degree of the culpability determines the extent of the disadvantage.<sup>82</sup> On the other hand, if objectionable behaviour misses culpability, this may lead to a more beneficiary approach of reasonability for the acting party.<sup>83</sup> This means that the behaviour of visitors, including the culpability of disorderly behaviour, influences the interpretation of content and effects of the open behavioural norms and sanctions.

A second factor concerns the qualities of the contracting parties. The Dutch Supreme Court often states that ‘social position’ is relevant for determining the requirements of reasonableness and fairness.<sup>84</sup> When assessing the social position, consideration is given to the professionalism of the parties; a natural person who in that particular case is not acting in the course of a profession or business is generally better protected than a professional party.<sup>85</sup> This means for example that, in general, contractual terms are to be explained in favour of the nonprofessional party, like the visitors of public events organized by a professional agency or club. The specific regime on general terms and conditions in the Civil Code also aims to protect nonprofessional parties. The underlying idea is that professional parties have more knowledge and expertise than consumers and other natural persons. However, professionalism merely establishes a presumption on the appropriate protection, but the specific circumstances of the case concerning knowledge, expertise and negotiating position of both parties can refute such presumptions.<sup>86</sup>

Another relevant quality of the contracting parties is their ability to defend their own interests in negotiation; to what extent does a party actually have the power to alter the content and execution of the agreement to its own benefit?<sup>87</sup> The case studies have shown that visitors are not able to change neither the core terms nor the general terms of the agreement at all. When one party has to

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<sup>80</sup> Wolters, *ibid.*, pp. 111-114.

<sup>81</sup> HR 1 July 1983, *NJ* 1984, 149 (*Herzfeld/Groen*).

<sup>82</sup> Wolters, *supra* n. 79, p. 111. HR 19 May 1967, *NJ* 1967, 261 (*Saladin/HBU*); HR 20 February 1976, *NJ* 1976, 486 (*Pseudo-vogelpest*).

<sup>83</sup> HR 22 January 1993, *NJ* 1993, 598 (*Rupako/Karsten*).

<sup>84</sup> E.g. HR 19 May 1967, *NJ* 1967, 261 (*Saladin/HBU*). See further R.P.J.L. Tjittes, *De hoedanigheid van contractspartijen*, Kluwer, Deventer 1994.

<sup>85</sup> Wolters, *supra* n. 79, pp. 143-144.

<sup>86</sup> Wolters, *supra* n. 79, pp. 144-145. It is also relevant whether the weaker party has expert assistance or could have claimed this, Wolters, *supra* n. 79, Para. 4.4.

<sup>87</sup> Wolters, *supra* n. 79, Para. 4.7.

depend on its counterparty this also influences the negotiation position of both parties. This occurs for example when one of the parties is a governmental actor, a monopolist, or a supplier of essential services.<sup>88</sup> This has led some scholars to argue that monopolists have a greater responsibility to ensure that the content and outcome of the contract is fair.<sup>89</sup> However, not all relations of dependence can be characterized as ‘power’ nor are they all problematic in the face of reasonableness and fairness. One relevant question is whether the counterparty is the only available supplier. In the case of the KNVB, there is not an alternative, since its general terms are applicable on all professional football matches. Furthermore, one could question whether not concluding this contract with these terms lead to disadvantages compared to concluding the contract.<sup>90</sup> The outcome of the last question also depends on the interests which are served by concluding and executing the specific contract.

The third and last factor of influence for the requirements of reasonableness and fairness that I will discuss concerns the foreseeable interests that are involved.<sup>91</sup> The general rule is that greater interests lead to a stricter regime of reasonableness and fairness.<sup>92</sup> However, the different kinds of interests can be rather incomparable; fundamental interests and equity interests of individuals as well as general interests of society as a whole.<sup>93</sup> Protection of fundamental rights is of great weight when assessing reasonableness. Health, housing, liberty and security can be considered to be of fundamental importance to individuals.<sup>94</sup> Many of these interests are recognized as human rights in constitutional arrangements, also in Chapter 1 of the Dutch Constitution, and international treaties, such as the ECHR and its Protocols, although these documents are primarily focused on governmental control. Nonetheless, these norms do play a role in assessing the scope of reasonableness in a given case, since according to Article 3:12 Civil Code (as set out above) fundamental conceptions of law need to be taken into account.<sup>95</sup> This is a form of indirect application of human rights

<sup>88</sup> Wolters, *supra* n. 79, pp. 192-193.

<sup>89</sup> Wolters, *supra* n. 79, pp. 192-193, citing J.C. van Oven, ‘De tequeri debes. (Naar aanleiding van H.R. 11.11.’60 N.J. 60.599)’, *NJB* 1961, pp. 5-6.

<sup>90</sup> D.P. Ruitinga, *Misbruik van economisch overwicht als grond voor het aantasten van overeenkomsten*, Kluwer, Deventer, 1982, pp. 2-4.

<sup>91</sup> Wolters, *supra* n. 79, Chapter 6.

<sup>92</sup> Wolters, *supra* n. 79, p. 230. Presence or absence of disadvantage may be of influence as well.

<sup>93</sup> Wolters, *supra* n. 79, pp. 236-239 and Para. 6.4.

<sup>94</sup> According to Article VI-5:202 (3) Draft Common Frame of Reference (DCFR).

<sup>95</sup> See Van Rooij, *supra* n. 44, on horizontal effect in the case of private parties maintaining public order. Also O.O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, Sellier European Law Publishers, München, 2007.

in horizontal relations; not applying the human right as such, but putting weight upon the interest a person has in exercising this right.<sup>96</sup>

However, the case studies on public events show it is not always apparent how fundamental rights should be weighed against equity interests of the event organizer and the general interest of public order. Is the liberty of movement within the public domain for the purpose of gaining access to social resources of greater importance than the security of the public at these public places? And what is the value of the right to privacy if a systemized breach of this right does in fact prevent disorder and protects the health and security of the public? If one party claims an interest in a fundamental right this merely establishes a presumption of a result in favour of this party. Specific interests of the counterparty can refute this presumption. Another general rule implies that reasonability only favours the general interest in case of objective signs of severe breaches thereof.<sup>97</sup> After all, party autonomy and freedom of contract are also considered to be of general interest. This shows that a thorough review of the specific circumstances of the case is necessary for the determination of what is reasonable.

#### 4. Concluding Remarks

Private actors increasingly contribute to public order and this raises questions on legitimacy and applicable norms. In the course of finding a suitable framework for assessing these fundamental questions, the first part of this chapter focused on the relevance of ideas in legal philosophy on power, public order and personal liberties. The second part of this chapter examined whether these ideas can be operationalized in specific cases, having regard to Dutch contract law.

This chapter examined two cases in which private parties contribute to public order: the Dutch football association KNVB and ID&T, a commercial company organizing large dance events. Both parties use contractual terms to maintain public order. I observed three specific characteristics. First, event organizers are not only entitled to take such measures, but they also should do so since they are responsible for the order at their public events. Second, imposing regulations affects personal liberties of the visitors and therefore affects the accessibility of a social resource. Third, visitors have limited possibilities to alter the contractual terms in order to avoid breaches of their personal liberties. I have determined

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<sup>96</sup> Wolters, *supra* n. 79, p. 96. See J.M. Smits, 'Constitutionalisering van het vermogensrecht', in *Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking*, Kluwer, Deventer, 2003.

<sup>97</sup> Wolters, *supra* n. 79, pp. 249-259.

that the KNVB is a monopolistic actor in its field, and this definitely indicates power. ID&T, however popular among the public, does not hold a monopolistic position in the dance industry. It may be considered a leading company, but many similar suppliers are available in a competitive market.

Then I discussed several ideas developed in social contract theories. The question is whether these ideas provide a relevant normative framework for private actors? First of all it is important to realize these theories focus on governments. A fictional social contract can serve as a justification of breaches of personal liberties by a governmental body. In return the government needs to respect certain personal liberties. Analogous application of this idea on private actors is only appropriate when actions of these private actors show relevant similarities to governmental actions.

The possibility to unilaterally impose restrictions to others is one similarity. In the case studies, restrictions are based on consent, and freedom of contract is primarily the justification for breaches in personal liberties. However, if one actor is to a great degree able to realize his will against the will of others, this indicates power and suggests unilateral imposed restrictions after all. Another similarity is the contribution to the public interest. In my opinion though, the mere contribution to public interest is in itself not sufficient to justify the applicability of public law safeguards to the behaviour of private actors. If the public-private divide feels artificial, additional or underlying reasons can be perceived, for example the existence of an economic monopoly or governmental influence. Power seems to be the most important reason to adopt a more stringent protection of personal liberties compared to normal commercial transactions.

This leads to the question whether the idea that power and protection of liberties are reciprocal, can be operationalized in the law applicable in a specific case, like in the cases studied in section 1. In Dutch contract law, these ideas can indeed influence the application of the general open norm prescribing that parties in a contractual relationship must act according to the demands of reasonableness and fairness to one another. Party autonomy and freedom of contract constitute a horizontal relationship, but reasonableness serves as a correctional mechanism when there appears to be a societal unacceptable outcome in a specific case.

Case law also indicates the open norm of reasonableness and fairness provides reference points to a more stringent protection when a party, contributing to public order, is in a position of power. Reasonability generally favours a person,

such as a visitor of a public event, if his counterparty is a professional party, like the KNVB, especially if this party is holding a monopolistic position and is able to defend his own interests in negotiation, and especially if this contract results in breaches of personal liberties. On the other hand, if the weaker party behaves culpable objectionable, this will be to his disadvantage. In the end, examining the specific context of each specific case seems inevitable. Professionalism, knowledge, expertise, specific interests and behaviour of both parties are tools to determine the mutual relationship and necessary correction to establish a reasonable outcome. This context-dependant approach might lead to a certain degree of unpredictability, but this chapter attests that the flexibility of such an approach contributes to the desired protection of personal liberties in a grey area of the public-private divide.